SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 14

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

APPELLEE'S BRIEF

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Statement of the Case

The statement of the case set forth at page 7 of the Appellant's Brief is substantially correct with one notable exception. To the statement of fact must be added the following:

> "However, the Appellants were not incarcerated but were released upon bond prior to their incarceration so that the very question presented herein could be litigated. In fact, they have never been incarcerated, but have continuously, since March 1, 1954, had their complete freedom so that the right of their counsel to be present during this investigative hearing could be determined."

Question

The Appellee agrees that the question before this Honorable Court is as set forth at page 6 of the Appellants' Brief as follows:

> "*Does the fire marshal's power to declare the hearing before him 'private' and to deny appellants' request for*

counsel deny the appellants due process of law as guaranteed by the XIV Amendment to the United States Constitution?"

Appellee would particularly like to stress that sentence which appears at page 3 of Appellants' Brief in which they state:

> "The only statute drawn in question as being invalid on the ground of its being repugnant to the Constitution was Ohio Revised Code Section 3737.13."

That section provides:

> "Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The Appellee would also like to concur in, and emphasize, the Appellants' statement, at page 5 of their brief, that "the question as to fire marshal's right to summarily commit has not been raised * * *."

At the possible risk of belaboring this Honorable Court, Appellee believes it incumbent to clearly point out that the issue presented herein as to the presence of counsel, as set forth by the Appellants, arose in conjuncton with the appearance, swearing, and testifying of the Appellant witnesses before an administrative official, and *not* in conjunction with the commitment of the Appellants to the county jail.

Directive of the Court

In postponing consideration of the question of jurisdiction to the hearing of the case on the merits, this Honorable Court requested that the parties discuss "this Court's jurisdiction to consider any questions raised by the possible applicability of *In re Murchison*, 349 U.S. 133, and *In re Oliver*, 333 U.S. 257, to the proceedings involved in this case."

The case of *In re Oliver*, supra, concerns itself with the question of whether a one-judge Grand Jury has the right to summarily punish a witness for contempt, and since it had been held that he did not, the case of *In re Murchison*, supra, was concerned with the question as to whether that same judge could hear the contempt proceeding.

If the question herein were the question of the right of the fire marshal to incarcerate the recalcitrant witnesses, the doctrines announced in *In re Oliver* and *In re Murchison*, supra, might well apply. Those doctrines do not, however, apply to the case at bar on its facts, since the question to be determined here is *not* the question of the right to counsel in a contempt proceeding. In fact, the Appellants herein were so ably represented in the matter of the contempt that, prior to their appearance before the Sheriff for incarceration, their bond had been set and a journal entry effecting their release had been filed.

The applicability of the decision of this Court pronounced in *In re Oliver*, supra, is clearly determined by the majority opinion of the Court in that case when it stated, as reported at 333 U.S. 257, page 265:

> "Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding."

As pointed out by Appellants at pages 3, 5, and 6 of their brief, referred to supra, the question before this Honorable

Court is *not* the right to counsel as a defendant in a contempt proceeding, but the petitioners' rights as a *witness* in a secret arson investigation. When the witnesses demanded the presence of counsel during the investigation itself, and then refused to take an oath in the absence of counsel, the issue to be determined herein was joined, and the commitment of the witnesses, which did *not* result in their incarceration, was the vehicle by which the issue already joined could be litigated.

The sole issue before this Court for determination is the constitutionality of the section enacted by the Ohio Legislature which gives to an administrative official the right to conduct his investigations in private so that the law enforcement powers of the state fire marshal to investigate the origin of fires shall not be hampered by persons not required to be present. It is respectfully submitted that the doctrines of *In re Oliver* and *In re Murchison,* supra, are not in derogation of, nor do they detract in the slightest degree from, that legislative grant of authority to an administrative official.

Argument

Appellants' Brief, at page 8, correctly points out that:

> "* * * Not only does the Sixth Amendment apply solely to the federal government, but also the investigation of the fire marshal admittedly is not a 'criminal prosecution' and the appellants are not 'accused' within the language of said amendment. Clearly, the right to counsel is by no means absolute, but if such right exists, excluding the Sixth Amendment, such right must necessarily be derived from the 'due process' clause of the XIV Amendment. * * *"

There are many definitions of the phrase "due process of law", some of which are set forth in Appellants' Brief,

but in order to determine whether an individual has been deprived of life, liberty, or property without due process of law, the circumstances of each transaction must be examined. In the case at bar, Appellants were summoned before an administrative official conducting an arson investigation. They presumably consulted with counsel prior to their appearance, since they were accompanied by counsel. As pointed out above, they were ably represented by counsel from the time they refused to be sworn in the absence of counsel. They have not been deprived of their liberty, and they were afforded an open hearing on the issue of their right to counsel. Thus it cannot be said that they have been denied due process of law because they were denied the assistance of counsel.

Appellants advance the argument, however, that compelling them to be sworn or to testify in this investigation without the presence of counsel would be a denial of due process of law. The Appellants fail to recognize the distinction between an investigation and a hearing. This distinction is recognized in numerous cases including the case of *Bowles* v. *Baer,* reported in 142 Federal (2d) 787, decided by the United States Circuit Court of Apepals of the 7th Circuit on May 25, 1944. The facts of that case arose from an investigation similar in nature to that under consideration in the instant case in that the price administrator, under the provisions of the Emergency Price Control Act of 1942, ordered the defendants to appear without attorneys and without a court reporter for a private investigation by the price administrator. The court in its opinion clearly pointed out the distinction between hearings and investigations. The court stated that investigations are, in effect, informal proceedings held to obtain information to govern further action and they are not proceedings in which action is taken against anyone. On the other hand,

hearing contemplates parties, a determination of the law and facts at issue, and a conclusion whereby the right of such parties may be affected. In the latter case, that is, of hearings, parties are entitled to have their attorneys present.

In effect, an investigation by an administrative body is akin to the investigations conducted by Grand Juries. See *Genecov, et al.* v. *Federal Petroleum Board,* 146 Federal (2d) 596. Certiorari denied 65 S. Ct. 913. Grand Jury investigations have for years been conducted in secret and the testimony there elicited becomes the basis, perhaps, for further action. This is not violative of the Fourteenth Amendment of the Constitution of the United Staes. See *United States* v. *General Supply Association, et al.,* 34 Federal Supplement 241. The court in that case referred to that part of the Fifth Amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury. The court then stated:

> "That is the only constitutional guaranty regarding the Grand Jury. After the presentment or indictment other guarantees come into play. The accused has then a right to an open trial, to confront the witnesses, to have the assistance of counsel, and trial by jury. These provisions, however, do not affect the deliberations of the Grand Jury."

Instead they contend that Section 3737.13, Ohio Revised Code, is unconstitutional because it contravenes the Fourteenth Amendment of the United States Constitution. This particular section provides only the manner in which the state fire marshal may conduct his investigations. This section, in and of itself, can in no way affect the Appellants'

liberty or deprive them of any property. While it is true that if the testimony of a witness before this investigative hearing produces some evidence that a crime has been committed, that evidence would be presented to the Prosecuting Attorney and in turn would be presented to the Grand Jury, which might return an indictment and thus lead to a criminal trial of an accused, it is these very steps which make up the concept of due process of law in our system of jurisprudence relating to criminal offenses. It is certainly furthering the scope of the Fourteenth Amendment to attempt to extend it to permit a witness before an investigative hearing to be represented by counsel.

While the protective mantle of the Fourteenth Amendment is very broad, surely it cannot be said to extend to the presence of counsel for a *witness* during an investigation to determine whether or not a crime has been committed or whether charges should be preferred. If it is so broadened, the power of all law enforcement agencies to investigate crime will be wholly abrogated. An investigation is designed to obtain information to govern further action by administrative personnel. The most formalized investigation is that conducted by a Grand Jury; these have traditionally been cloaked with secrecy, and witnesses are not entitled to have their counsel present. Can this be only less true of this investigation which is one step farther removed from a Grand Jury proceeding?

It should be emphasized at this point that the Appellants, during the fire marshal's investigation, refused even to be sworn.

There is nowhere in the law interpreting the Fourteenth Amendment of the United States Constitution any provision or holding which would protect a person refusing to take an oath because his counsel is not present. In fact, the United States Circuit Court of Appeals for the 9th Circuit

in *Goodman* v. *United States,* reported in 108 Federal (2d) 516, specifically held that even compelling a witness to take an oath of secrecy prior to his testifying before the Grand Jury does not violate either the Fifth or Sixth Amendment of the United States Constitution nor does it deprive him of life or liberty without due process of law.

The opinion as reported in the case of *In re Black,* 47 Federal (2d) 542, has a very distinct statement which sets forth the rights of a person when he is called as a witness. This case arose on the specific question of a right of a witness to be accompanied by counsel in a Grand Jury proceeding. In that case the Court stated, at page 543:

> "* * * The appellant insists that, before a witness is compelled to testify before a grand jury, he should be apprised of the subject-matter of the inquiry or the name of the persons against whom the inquiry is addressed, *and that he should not be called upon to go unaided by counsel to an inquiry which is unlimited in scope and for which he is entirely unprepared.* But the privilege of a witness against self-incrimination is personal. *Neither at a trial nor before a grand jury is he entitled to have the aid of counsel when testifying.* It is hard to see then why he must be warned of the nature or extent of the testimony which is likely to be called for. A witness is not entitled to be furnished with facilities for evading issues or concealing true facts. * * *" (Emphasis added)

This same principle was followed in *United States* v. *Blanton,* 77 Fed. Supp. 812.

Conclusion

It is therefore respectfully submitted that in view of the above, a person who appears for the purpose of answering

questions in an investigation by an administrative body does not have the right to have counsel with him at all times. An administrative investigation is similar in nature to a Grand Jury investigation and it is only if charges should subsequently be brought against a person that it can be said that the Fourteenth Amendment of the Federal Constitution requires that the person be allowed counsel at his side.

Even if Petitioners-Appellants' right to counsel before an administrative investigation is sustained, it should be pointed out to this Honorable Court that question is premature. This is because the Petitioners-Appellants even refused to take an oath on the sole grounds that they wanted their attorneys present.

It is therefore respectfully submitted that the Fourteenth Amendment does not require that Petitioners-Appellants have the right to counsel for the purpose of taking an oath.

Respectfully submitted,

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